United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1581

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P/S

In The

United States Court of Appeals

For The Second Circuit

ROBERT R. FELTON and EDWARD J. EGAN,
Plaintiffs-Appellants,

vs.

WALSTON AND CO., INC., JAMES NISSAN MARINE MIDLAND BANKS, INC., MARINE MIDLAND BANK-WESTERN, MARINE MIDLAND BANK-NEW YORK, MARINE MIDLAND BANK-ROCHESTER, MARINE MIDLAND BANK-CENTRAL, MARINE MIDLAND BANK-SOUTHERN, MARINE MIDLAND BANK OF SOUTHEASTERN NEW YORK, N.A., MARINE MIDLAND BANK-NORTHERN, MARINE MIDLAND BANK-EASTERN NATIONAL ASSOCIATION, MARINE MIDLAND BANK-CHAUTAQUA, NATIONAL ASSOCIATION, MARINE MIDLAND-TINKER NATIONAL BANK, INC., DRYFUS-MARINE MIDLAND, INC., JOEL BROWNSTEIN, 3 I CO./ INFORMATION INTERSCIENCE, INC.,GERALD L. BRODSKY, MAURICE BRODSKY, ARTHUR W. ELIAS, MARVIN S. RIESENBACH, MARVIN SCHILLER, IRVING H. SHER, STICHTING EXCERPTA MEDICA (EXCERPTA MEDICA FOUNDATION), MEDISCHE REFERANTAN, (EXCERPTA MEDICA) N.V., INFONET (EXCERPTA MEDICA-RESCONA) N.V., ELTRAC (INFONET) N.V., PETER WARREN, MAIN LAFRENTZ AND CO., FRED VON EUGEN, S. KIM KESSLER AND GERALDINE KESSLER,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR PLAINTIFFS-APPELLANTS

ROBERT R. FELTON
Attorney for Plaintiffs-Appellants
42 Third Avenue
Mineola, New York 11501
(516) 746-5711

1

TABLE OF CONTENTS

TABLE OF CASES

STATUTES AND REGULATIONS

AUTHORITIES

SUMMARY OF ARGUMENT

This is an appeal from an order dismissing this complaint under Rule 12(b)(6) FRCP for failure to allege fraud and conspiracy with particularity under Rule 9(b) FRCP, and in the same order the lower Court stating that it would deny plaintiffs' class action motion.

Appellants first contend that the lower Court committed clear and reversible error by failing to heed the mandate of Rule 12(b)(6) that a motion to dismiss must be converted into a motion for summary judgment when matters outside the pleading were presented to and not excluded by the court.

Appellants next contend that had the Court below properly treated the motions to dismiss as summary judgment motions, the motions would have been denied. The complaint that was dismissed was neither the original nor sole pleading in this case. It had been preceded over the course of several months by numerous other pleadings both by appellants and by respondents and the submissions of numerous documents including affidavits, exhibits and depositions to the court. Had the court considered the facts demonstrating the fraud of these defendants that were present in these papers, it would have been clear that there were genuine issues as to material facts that would

require that this case go to trial, under Rule 56 FRCP.

Appellants further contend that by respondents' filing responsive pleadings to the lengthy original amended complaint, respondents waived their right to challenge this later complaint, which was merely a short and concise version, served by the direction of the lower Court.

Appellants thereafter contend that this later complaint has stated the facts upon which the action is founded consistent with Rule 8 FRCP with the particulartiy required by Rule 9(b) FRCP and should not have been dismissed.

Appellants also contend that the lower Court should have granted plaintiffs' leave to correct any technical defect in pleading.

Appellants finally contend that the lower Court committed clear and reversible error in its failure to convass all the factual aspects of this litigation. Had the lower Court considered all the facts, it would have been required to grant plaintiffs' class action determination motion. Thus the lower Court, by closing its eyes to the facts presented by plaintiff, and thereby failing to perform its duties as a finder of the facts under Rule 23(b)3 FRCP, has failed to exercise informed discretion.

INTRODUCTION

In this securities fraud action brought under the Securities Exchange Act of 1934 (the "Exchange Act"), the statutory law of the State of New York and principles of common law, the plaintiffs appeal from the order and judgment of the District Court for the Southern District of New York dismissing plaintiffs' complaint, without leave to amend, and denying plaintiffs' motion for an order permitting this action to proceed as a class action* (555a-564a).**

The decision below was rendered on defense motions to dismiss the complaint, filed November 9, 1973,

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*In its decision dismissing the complaint the lower Court stated that "[f]or the foregoing reasons therefore the court would deny the plaintiff's motion for an order permitting this action to proceed as a class action." (563a-emphasis added.) Therefore, although the lower court did not formally rule on the class action motion (because it dismissed the complaint in its entirety) its decision contains its explicit statement of how it would rule. Accordingly, should this court agree with appellant that the dismissal of the complaint was erroneous, it would serve no purpose to remand for the purely administrative act of entering a formal denial of class action status and it is respectfully submitted that this court should decide the issues relating to that portion of the lower court's opinion.

**All numerical references are to Appellants' Appendix.

under Rules 12(b)6 and 9(b) of the Federal Rules of Civil Procedure (hereinafter FRCP). One of the defendants (Main Lafrentz) had moved for summary judgment under Rule 56 FRCP, but the Court did not pass on this motion. This defendant renewed its summary judgment motion in the alternative to its motion to dismiss. Some of the defendants (Excerpta Medica subsidiaries) moved to dismiss for lack of personal jurisdiction and for insufficiency of service of process under Rule 12(b)2 and 12(b)3 FRCP, but the Court also did not pass on their motion (503a-518a, 519a-522a, 523a-524a, 525a-527a, 528a, 223a-224a).

Judge Bonsal rendered his order of dismissal and memorandum decision on March 29, 1974 (555a-563a).

Pertinent provisions of the Exchange Act and of the rules and regulations thereunder are annexed to this brief (infra pages 65-66) or set forth in the text.

JURISDICTION

The jurisdiction of this Court rests on 28 USC §1291.

The order of dismissal and memorandum decision was entered on March 29, 1974. Judgment of

dismissal was filed on April 3, 1974. Plaintiffs' notice of appeal was filed on April 22, 1974.

PRIOR PROCEEDINGS

The Amended Complaint served and filed on August 14, 1973.

Plaintiff served and filed an amended complaint on August 14, 1973 (35a-71a).* This amended complaint contained 180 paragraphs and was pleaded upon information and belief (35a).

Defendants accepted this amended complaint as pleading fraud with particularity and served their Answers thereto (85a-92a, 93a-98a, 103a-107a, 108a-112a, 160a-165a).

Depositions and Discovery

Plaintiff Felton was deposed by defendants on October 9, 1973 with continuance on October 10, 11, 12 and 15.** During the course of his deposition, plaintiff produced documents requested by defendants for inspection and copying, specifically all

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*The original complaint was filed on May 17, 1973 (9a-17a). One of the defendants moved to dismiss or for a more definite statement (26a-27a). The Court granted plaintiff leave to serve and file this amended complaint.

**Relevant portions of plaintiff's testimony was presented to the Court below by defendants and plaintiff.

confirmation tickets of plaintiff's purchases and sales of 3I Co.* stock detailing dates and prices of purchases and sales.**

Plaintiff deposed defendant Joel Brownstein on October 16-17, 1973. Brownstein produced certain documents for inspection and copying, among which were certain Reports (393a-395a, 396a-401a), Bulletins (402a, 404a, 405a-406a, 407a-408a, 409a-410a) and letters*** (403a, 411a). Plaintiff deposed defendant James Nissan on October 30, 1973 and November 1, 1973. Nissan produced copies of Brownstein's May 17, 1971 Report (396a-401a) and Bulletins (402a, 404a and 405a).****

Plaintiff's Motions to
Amend the Complaint.

Plaintiff's deposition of Brownstein and certain documents produced by Brownstein provided additional facts which required plaintiff to move the

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*3I Co./Information Interscience, Inc. hereinafter referred to as 3I Co.

**Using plaintiff's documents, defendants prepared an Exhibit entitled "Plaintiff's Transactions in 3i Stock" which defendants submitted to the Court below (367a).

***Brownstein's Reports, Bulletins, letters and relevant portions of Brownstein's testimony (445a-487a) were presented by plaintiff to the Court below.

*****Nissan's copies of Brownstein's Report and Bulletins and relevant portions of Nissan's testimony (422a-431a) were presented by plaintiff to the Court below.

Court to amend the August 14th complaint (174a-175a).*

Coincidentally, plaintiff Felton was contacted by one Edward J. Egan, Esq. Egan had purchased 3I Co. stock and had sustained a substantial loss on its sale. Egan had learned of plaintiff's law suit through his reading of a 3I Co. prospectus and he retained plaintiff Felton as his attorney.** Plaintiff thereupon moved to further amend the complaint to add Egan as a co-plaintiff (296a-297a) submitting Egan's affidavit (299a-300a) in support thereof.***

Judge Bonsal's Direction to
Plaintiffs on November 19, 1973.

All parties appeared before Judge Bonsal on November 19, 1973. Plaintiff's motion to amend the complaint returnable November 12th was sub judice (174a-175a). Plaintiffs' motion to amend the complaint to add Egan as a co-plaintiff was before the court for argument (296a-297a).

Judge Bonsal did not allow argument, but

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*Plaintiff's motion to amend the complaint was returnable November 12th. Annexed thereto was plaintiff's proposed amended complaint (179a-222a).

**Plaintiff Felton, Robert R. Felton, had instituted this action as plaintiff pro se.

***Plaintiff's motion to amend the complaint to add Egan as a co-plaintiff was returnable November 19th. Annexed thereto was plaintiffs' proposed amended complaint (303a-347a).

instead addressed himself to plaintiff's amended complaint filed August 14, 1973 (35a-71a) stating that he had read this complaint and plaintiff's two (2) proposed amended complaints. He found them overlong and he specifically objected to the term "tipping" and "leaking."* He than requested that plaintiffs serve and file a short and concise complaint.

Judge Bonsal in his direction to plaintiffs never stated that a "final" complaint was ordered.**

Pursuant to the Court's direction, plaintiffs filed a short and concise complaint on November 29, 1973 (489a-501a). On December 3, 1973, by memo endorsed on this complaint, Judge Bonsal ordered "Leave to file the amended complaint is granted" (502a).***

Summary of November 29th Complaint.

The Complaint invokes federal jurisdiction

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*"Tipping" and "leaking" were used in the complaint in the sense of the purposeful divulging of insider information.

**Judge Bonsal's statements were not recorded as there was no stenographer present during oral argument on this date.

***Note that Judge Bonsal's order was endorsed on plaintiffs' complaint 5 days after filing. Furthermore, nowhere therein is there any statement that this complaint was to be a "final" amended complaint.

under §27 of the Exchange Act, 15 USC §78aa, and the principles of pendent jurisdiction (490a). In summary, it alleges:

3I Co.* and its president, Gerald Brodsky,** schemed with all these defendants in a common course of fraudulent action by the use, means and instrumentalities of interstate commerce and the mails, which was directed against plaintiffs and all other 3I Co. stock purchasers for the period December 10, 1970 through October 24, 1972 for the purpose of artificially and substantially inflating the market price and causing public demand for otherwise worthless common stock, and thereby enabling defendants to sell and dispose of their stock at inflated prices.

Common Course of Fraudulent Action By 3I Co. and Gerald Brodsky with Defendants.

The common strategy of these defendants, directed against plaintiffs and others similarly situated, was:

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*3I Co. was a publicly held business corporation whose common stock Class A was traded over the counter (492a).

**Gerald Brodsky was the chief 3I Co. officer, and the major 3I Co stockholder. Brodsky periodically converted large blocks of restricted 3I Co. stock into common stock, Class A, for sale on the open market (493a).

To present a false and inflated present and future financial picture of 3I Co. (495a).

To present a false and misleading picture of 3I Co. as an expanding company making major viable acquisitions (496a).

3I Co. and Gerald Brodsky conspired and schemed with defendants Excerpta Medica,* Peter Warren** and Fred Von Eugen*** (aided and abetted by the auditing firm of Main Lafrentz and Co.) to use restricted stock so as to deceptively and materially enhance the 3I Co. 1970 balance sheet by stating therein a purchase of "Data bank licenses, at cost $1,000,000," equivalent to 62% of the entire 3I Co. assets (496a). The 1970 balance sheet was part of 3I Co.'s Annual 1970 Report.

There was no $1,000,000 cost to 3I Co. for this data bank license. The real intent of these

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*Stichting Excerpta Medica, a Netherlands Corporation, and its subsidiaries, Medische Referatan, N.V., Infonet, N.V., and Eltrac, N.V., collectively referred to as Excerpta Medica (494a).

**Peter Warren, an employee and a director of Excerpta Medica, was designated as Excerpta Medica's attorney in fact and agent in its agreement with 3I Co. Warren was also elected a 3I Co. director (495a).

***Fred Von Eugen was a business broker for the Excerpta Medica agreements with 3I Co. (494a).

defendants was evidenced in a later SEC report wherein the restricted stock referred to in the Excerpta Medica agreements as the consideration for the worthless data bank license was properly characterized by 3I Co. as terminated stock rights (496a, 500a-501a).

3I Co. and Gerald Brodsky with Von Eugen (aided and abetted by Main Lafrentz and Co.) materially understated current liabilities on the 3I Co. 1970 balance sheet in the amount of $150,000 (496a, 500a).

3I Co. and Gerald Brodsky with defendants Kessler* (aided and abetted by Main Lafrentz and Co.) falsely stated that SLC, a 3I Co. subsidiary had attained the necessary profitability under the terms of their original agreement, when in fact this subsidiary had sustained a net earnings loss for fiscal 1970** (496a-497a). This false statement of SLC profitability was contained in the 3I Co. Annual 1970 Report (496a-497a, 501a).

3I Co. and Gerald Brodsky with defendant

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*S.Kim Kessler and Geraldine Kessler, referred to as Kessler, owned a substantial interest in Scientific Literature Consultants, Inc. which by agreement was merged into Scientific Literature Corporation (SLC). Kessler were employed by 3I Co to manage SLC.

**The false statement of SLC profitability was for the purpose of these defendants improperly amending their original agreement.

Maurice Brodsky* falsely and deceptively declared to the investing public that 3I Co. was an expanding company making a major viable acquisition in its purchase of the remaining interest in American Micromation Industries, Inc, when in fact this acquisition was worthless. 3I Co. paid $505,724 for intangible assets (497a).

3I Co. and Gerald Brodsky with defendants Aruthur Elias, Marvin Riesenbach, Marvin Schiller and Irving Sher** (aided and abetted by Joel Brownstein) falsely and deceptively declared to the investing public that 3I Co. was an expanding company making a major viable acquisition in its purchase of ICA,*** when in fact this acquisition was worthless. 3I Co. paid $2,960,904 for intangible assets.

3I Co. and Gerald Brodsky with defendants

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*Maurice Brodsky, the brother of Gerald Brodksy, was a 3I Co. shareholder and warrant holder. He was also the president and a major stockholder of American Micromation Industries, Inc. (493a).

**Arthur Elias, Marvin Riesenbach, Marvin Schiller and Irving Sher were officers, directors and shareholders of ICA. Elias became president and a director of 3I Co., Riesenbach became vice-president, treasurer and a director of 3I Co. and Schiller and Sher became vice-presidents of 3I Co. (494a).

***Information Company of America, I.C.A. and Information Corporation of America referred to as ICA.

Joel Brownstein* and James Nissan** and with the knowledge, assistance and connivance of defendants Marine Midland*** and Walston and Co., Inc.**** and their officers and employees, issued, disseminated and circulated to plaintiffs, others similarly situated and to the investing public, false, fraudulent and deceptive Reports***** and Bulletins******
(1) falsely detailing the financial terms of the aforesaid Excerpta Medica data bank license agreements; (2) understating the 3I Co. loss of earnings for fiscal year 1970; (3) grossly over-estimating unfounded

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*Joel Brownstein was a securities analyst in Marine Midland's employ. During the course of his employment, Brownstein wrote Reports and Bulletins on 3I Co. and also traded in its common stock (493a).

**James Nissan was a vice-president of Walston and Co., Inc. Nissan was a 3I Co. stockholder, creditor and a co-guarantor of 3I Co. bank loans (492a).

***Marine Midland Banks, Inc. and its subsidiary banks, New York Banks and partially owned subsidiary Dreyfus-Marine Midland, Inc., collectively referred to as Marine Midland, traded in 3I Co. common stock and was a 3I Co. creditor (492a-493a).

****Walston and Co., Inc., a stock brokerage firm, was a dealer and made a market in 3I Co. common stock.

*****Brownstein Reports on 3I Co. were dated September 24, 1970 and May 17, 1971 (493a).

******Brownstein Bulletins on 3I Co. were dated June 8, 1971, August 10, 1971, September 7, 1971, September 24, 1971, October 20, 1971 and October 22, 1971 (493a).

3I Co. earnings for fiscal year 1971; (4) grossly overestimating unfounded 3I Co. earnings for fiscal year 1972; and (5) deceptively stating a P/E (profit earnings) ratio for 3I Co. common stock (497a-498a).

Brownstein received a letter dated June 23, 1971 from Gerald Brodsky containing Brodsky's disavowal and informing Brownstein that his May 17, 1971 Report was in error. Although Brownstein had the duty to communicate in his subsequent Bulletins the adverse information contained in Brodsky's letter, Brownstein failed to do so and fraudulently continued to recommend the financial prospects of 3I Co. and continued to induce the purchase of 3I Co. stock (498a).

3I Co. and Gerald Brodsky with Main Lafrentz and Co., issued, disseminated and circulated the 3I Co. 1970 Annual Report in which the Main Lafrentz Certificate (Report) and Notes to 3I Co. Consolidated Financial Statements falsely and misleadingly (a) failed to disclose that 3I Co. had materially understated its current liabilities by $150,000; (b) failed to disclose that 3I Co. materially overstated the issuance of common stock, Class A and capital in excess of par value by $150,000; (c) misrepresented the terms of the Excerpta Medica data bank license agreement and failed to disclose Fred Von Eugen's role as a business broker; (d) failed to disclose that 3I Co. assets had been

materially overstated and inflated to $1,000,000 by the inclusion of the data bank license at cost, whereas in fact defendants had deceptively utilized inflated restricted stock in their transaction; and (e) failed to disclose that 3I Co.'s subsidiary, Scientific Literature Corporation had sustained a net earnings loss for fiscal year, and that accordingly there was no basis for 3I Co.'s opinion that its subsidiary would achieve the necessary earnings to support the amended agreement (499a-501a).

As the result of the aforesaid common course of fraudulent action of these defendants, which initially reached the investing public with the filing of defendant 3I Co. 1970 Annual Report on December 10, 1970, the market price of the otherwise worthless 3I Co. common stock was caused to have a substantial artificial price increase, and plaintiffs and others similarly situated were induced to purchase this stock without any knowledge of these defendants' actions. Plaintiffs and others similarly situated did not learn the untruths, omissions and aforesaid actions of defendants until after defendant 3I Co. filed its 1972 Annual 10K Report on October 24, 1972.

ARGUMENT

POINT I

MATTERS OUTSIDE THE PLEADING WERE PRESENTED TO AND NOT EXCLUDED BY THE COURT BELOW. BY FAILING TO TREAT DEFENDANTS' MOTIONS TO DISMISS AS SUMMARY JUDGMENT MOTIONS AND BY FAILING TO DISPOSE OF DEFENDANTS' MOTIONS AS PROVIDED IN RULE 56 FRCP, THE COURT BELOW COMMITTED REVERSIBLE ERROR (RULE 12(b) FRCP).

On defendants' motions to dismiss, matters outside the pleading were presented to and not excluded by Judge Bonsal.*

Furthermore, one of the moving defendants, Main Lafrentz, renewed its summary judgment motion sub judice (233a-224a, 503a-504a).** Plaintiff had opposed the Main Lafrentz summary judgment motion by

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*Transcript of oral argument on defendants' motions to dismiss, January 7, 1974, the court in reply to plaintiffs' reference to Exhibits annexed to plaintiffs' opposition memorandum stated: "I saw that. I will read the exhibits, you need not read them to me (547a).

**Transcript of oral argument, January 7, 1974, the court stated: "Gentlemen, as I understand it, this is a series of motions to dismiss Mr. Felton's most recent complaint, is that right? I sort of gathered from reading the papers, that Main Lafrentz, the accountants are really seeking summary judgment. You are moving for summary judgment and I think the rest are moving to have the complaint dismissed on the ground that it doesn't comply with the rules" (533a).

affidavit verified November 8, 1973 (287a-295a). Furthermore, plaintiffs had presented the lower Court with two (2) affidavits with exhibits annexed, memoranda with exhibits annexed and relevant portions of defendants' testimony (368a-374a, 377a-391a, 392a-431a, 445a-487a).

The Supreme Court in Carter v. Stanton, 405 U.S. 669,670 92 S.Ct 1232(1972) vacated the judgment of the District Court stating:

> "But it appears on the motion to dismiss, which was based in part on the asserted failure 'to state a claim upon which relief can be granted' (App.19), matters outside the pleadings were presented and not excluded by the court. The court was therefore required by Rule 12(b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. (emphasis added.)

By accepting the aforesaid matters outside the pleading, Judge Bonsal was required to treat defendants' motions as summary judgment motions and to dispose of defendants' motions as provided in Rule 56 FCRP (Rule 12(b) FRCP). Therefore, Judge Bonsal committed reversible error when he failed to convert the defendants' motions into summary judgment motions, continued to treat them as motions to dismiss,

and granted them as such. Carter v. Stanton, supra.*

POINT II

(a) A FORTIORI, PLAINTIFFS' AFFIDAVITS, EXHIBITS, DEFENDANTS' ADMISSIONS IN PRIOR PLEADINGS AND RELEVANT PORTIONS OF DEFENDANTS' TESTIMONY PRESENTED TO THE COURT BELOW, SHOW GENUINE ISSUES AS TO MATERIAL FACTS AND THAT THIS CASE MUST GO TO TRIAL.

Assuming arguendo, but without conceding that the lower Court did not commit the reversible error discussed in Point I, the dismissal of the complaint was still error because plaintiffs' affidavits,** exhibits,*** defendants' admissions in prior pleadings,**** and relevant portions of defendants'

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*That the Court below did not undertake the necessary conversion is made clear by its statement that because it was granting the motions to dismiss it did not have to "reach. . .the [Main Lafrentz] motion for summary judgment" (563a).

**Plaintiff Felton's affidavit verified November 8, 1973, in opposition to Main Lafrentz summary judgment motion (287a-295a); plaintiff Felton's affidavits, verified November 11, 1973, in reply to Marine Midland opposition to plaintiff's motion to amend the complaint, with exhibits annexed (377a-391a) and plaintiff Felton's affidavit in reply to Main Lafrentz opposition verified November 8, 1973 (368a-374a); plaintiff Egan's affidavit verified November 7, 1973 (299a-300a).

***Exhibits to plaintiff's aforesaid affidavits and exhibits annexed to plaintiffs' memoranda. (392a-421a).

****Defendants' Answers to plaintiff's complaint filed August 14, 1973 (85a-92a, 108a-112a).

testimony* presented to the Court below show genuine issues as to material facts and that this case must go to trial (Rule 56 FRCP).

In Evans v. McDonnell Aircraft Corporation, 395 F.2d 359,361 (8th Cir.1968), after determining that:

> "Since both parties filed affidavits and exhibits in support of their respective positions, which were not excluded by the District Court, the motion to dismiss should properly have been treated as one for summary judgment. . ."

the court then examined the record and stated (on page 362):

> "From our examination the record reveals a material issue of fact as to whether McDonnells' manufacturing operations were exclusively oriented to the United States Government."

Appellants respectfully request that this appellate court examine the record. Appellants believe that the proof demonstrated in matters presented to the lower court, required its denial of defendants' motions.

The record will show that plaintiff's amended complaint filed August 14, 1973 (35a-71a) was accepted by defendants as pleading fraud with particularity. Defendants duly served their Answers thereto (85a-98a, 103a-112a, 160a-165a, 168a-171a).

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*Defendants Joel Brownstein and James Nissan have been deposed by plaintiff. (422a-431a, 445a-487a).

It was to this complaint that the Main Lafrentz summary judgment motion was addressed (277a-279a).

The record will show that after deposing defendant Joel Brownstein, plaintiff moved the Court below to amend the complaint to include additionally-discovered facts of fraud (174a-175a). Defendants Brownstein and Marine Midland opposed plaintiff's motion to amend and in a reply affidavit, verified November 11, 1973 (377a-391a), plaintiff detailed his case against Brownstein and Marine Midland, referring to Brownstein and Nissan admissions in prior pleadings and relevant portions of the testimony of defendants' Brownstein and Nissan and annexing exhibits thereto (392a-411a, 422a-487a). In brief summary, plaintiff presented the Court below the following:

> Joel Brownstein, an analyst employed in Marine Midland fiduciary department, prepared a report on 3I Co. dated May 17, 1971 (396a-401a). Brownstein testified that he prepared this report based on chats with Gerald Brodsky, James Nissan and "with other security analysts." However, when further questioned, Brownstein did not remember the names of the other analysts (445a-447a). Considering, that during the course of his deposition, Brownstein evasively answered "I do not remember" approximately 175 times, it was doubtful that there were any chats with other security analysts.

Brownstein's Answers (87a-88a) to paragraph Nos. 38, 43, and 53 of plaintiffs' amended complaint (41a-42a), wherein he claimed that he advised Brodsky and Nissan that the report he was preparing was "for use by Brownstein's employer (Marine Midland) only," and wherein he denied mailing, delivering and/or distributing copies of the report, were contradicted by Nissan's testimony.

"Q. How did you get (the report)?

A. I got a copy from the analyst (Brownstein) who wrote the report" (422a).

Brownstein's report was disseminated by Nissan who testified that he told customers about the (Brownstein) report (425a) and that he had photocopies sent "strictly for informational purposes to sell my accounts" (424a). One of the customers that Nissan told about the report was plaintiff Felton; Felton purchased 1000 shares of 3I Co. stock in reliance thereon at $20 per share on June 7, 1971 (148a-149a).

Conflicting testimony between Brownstein and Nissan also arose when Brownstein testified to a number of personal visits to Nissan's office and car rides with Nissan during which they discussed the finances of 3I Co. prior to his report of May 17, 1971 (448a-451a, 454a-455a). Contradicting Brownstein, Nissan denied any personal visits by Brownstein to his office prior to May 17, 1971, other than once when Brownstein was accompanied by others and thus Nissan denied any car rides with Brownstein (427a-431).

Prior to Brownstein's report of May 17, 1971, 3I Co.'s financial history showed net losses in every year of operation to fiscal year ended June 30, 1970. Brownstein's report estimated that for the first time 3I Co. would show a net profit for its fiscal year ended June 30, 1971 (396a, 401a). The significance of Brownstein's estimates in his report was its proximity to the close of 3I Co.'s fiscal year and its reliability was thus assumed to be based on Brownstein's review of 3I Co.'s completion of 46 weeks operations (i.e. June 30, 1970 to May 17, 1971).

In his report of May 17, 1971, Brownstein estimated net earnings of $.40 per share on $2,124,000 estimated revenues for fiscal year ended June 30, 1971 (396a, 400a-401a). This proved to be a gross misstatement since 3I Co. reported a net loss of $.33 per share on $1,052,647 revenues. 3I Co. revenues were less than 50% of Brownstein's gross over-estimate (272a).

Brownstein's over-estimate was not gross negligence. A letter from Brodsky to Brownstein on June 23, 1971 (403a) and Brownstein's actions thereafter evidence Brownstein's fraudulent intent to grossly over-estimate 3I Co. fiscal 1971 revenues and earnings.

Brodsky's letter written on June 23, 1971, 7 days before the close of 3I Co.'s fiscal year, in no uncertain terms informed Brownstein:

> "I see that [your] report contains earnings projections and other reported financial information which is in error" (403a).

Brownstein "was stunned by the letter." He tried to reach Mr. Brodsky for three weeks, maybe a month after." When Brownstein finally spoke to Brodsky, Brodsky said "the attorneys suggested that he do that,* but to forget about it, don't show it to anybody and throw it away" (466a-467a).

After his receipt of Brodsky's letter advising him of the errors in his report, there were no retractions, no turning back, no corrections by Brownstein as evidenced by his Bulletin dated August 10, 1971, wherein he fraudulently stated:

> 4th paragraph, "Since nothing has changed fundamentally, we would suggest re-reading our May 17th report" (404a).**

Also in this August 10th Bulletin, Brownstein exhorted his readers, the investing public, that at 15 3/4 market price, 3I Co. was "an excellent buying opportunity" (404a). Again in his September 24th Bulletin, Brownstein further urged its purchase at 16 3/4 market price (405a).

After the loss of earnings was finally announced by 3I Co. and its market price plummeted to $6, Brownstein's October 20, 1971 Bulletin merely announced Brodsky's resignation and ended with "we no further comment at this time" (407a).

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*I.e., that Brodsky write the letter to Brownstein.

**Although 3I Co. fiscal year had ended June 30, 1971, the losses for the year were not announced until October, 1971.

Brownstein testified that he never informed any co-employee or Marine Midland officer of the existence of Brodsky's letter until after 3I Co. announced its losses in October and the stock "went down" in price (477a-479a). For a period of approximately 3 months the existence of Brodsky's letter was only divulged by Brownstein to Nissan. What insider trading was done by Brownstein, Nissan and Brodsky and others, and who profited during this three month period is yet to be discovered.*

Aside from giving his report to Nissan, Brownstein also gave a copy thereof to one Martin Falk, an employee of the Goldman,Sachs investment house. Martin Falk later showed his copy of the Brownstein report to plaintiff Felton (154a). Further contradicting Brownstein's assertion in his Answer that his report was "for use by (Marine Midland) only," Brownstein's report traveled far and wide to the investing public, (e.g. to the president of the Bank of Paris (424a); to Jack Dalziel in California (411a); to plaintiff Edward J. Egan by personal delivery of Garret Penhale, a trust officer of a Marine Midland subsidiary (299a-300a).

Plaintiffs also presented the Court below with another Brownstein Bulletin dated June 8,

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*Nissan and Walston and Co., Inc. have not complied with plaintiff's request for production of a list of customer's transactions in 3I Co. Marine Midland and its subsidiaries have not complied with plaintiff's requests for transactions in 3I Co. stock.

1971, wherein Brownstein extolled the 3I Co. acquisition of ICA, stating:*

> "The company will add to 3i's growing number of data banks, an architectural/engineering data bank and an agricultural chemicals data bank. ICA has been operating profitably, grossing about $200m [thousand] before taxes on annualized revenues of $600m [thousand]" (402a).

It is submitted that a reading of Brownstein's Bulletin certainly supports plaintiffs' allegation that defendants

> "declared to the investing public that 3I Co.'s purchase of all the assets of ICA was a major viable acquisition. . ." (497a).

Plaintiffs' allegation that the ICA acquisition was "worthless" was also well founded with proof presented to the lower Court in the 3I Co. Consolidated Summary of Operations and Deficit for years ended June 30, 1968 to June 30, 1972. Therein, it was seen that within one year, 3I Co. wrote off the entire

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*This Brownstein Bulletin was received by Nissan as well as Egan (380a).

cost of the ICA acquisition as an "extra-ordinary loss." It is submitted that 3I Co.'s write-off of this ICA acquisition as an extra-ordinary loss is merely 3I Co.s' mode of terming the acquisition as "worthless" (415a).

Plaintiff submitted to the Court below two (2) affidavits, verified November 8, 1973,* concerning the use of the worthless Excerpta Medica data bank license to deceptively and materially enhance the 3I Co. balance sheet, aided and abetted by the false and misleading statements and omissions of material facts in the Main Lafrentz** Report (certificate) and accompanying Notes to 3I Co. 1970 Financial Statements (287a-295a, 368a-374a). In brief summary, plaintiff presented the Court below with the following:

> The Excerpta Medica data bank license was utilized to more than double 3I Co. assets by including in its 1970 balance sheet a data bank license stated at $1,000,000 (412a).

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*Plaintiff's affidavit in opposition to Main Lafrentz motion for summary judgment and annexed thereto plaintiff's affidavit in reply to Main Lafrentz opposition to plaintiff's motion to amend the complaint.

**Main Lafrentz and Co. (Main Lafrentz), a firm of independant auditors, examined the 3I Co. financial records and financial statements for fiscal year 1970 and issued their Report (certificate) and accompanying Notes, which were included in 3I Co. 1970 Annual Report to stockholders and SEC.

The data bank license did not cost 3I Co. $1,000,000, although its 1970 balance sheet falsely and misleadingly stated "Data bank licenses, at cost." Other than a payment of $150,000 to Von Eugen, defendants utilized restricted, legended 3I Co. stock in their agreements. Furthermore, although 3I Co. ostensibly was required to repurchase this restricted stock in 1971, no repurchasing was ever performed or required. The real intent of defendants was evidenced in a 1972 SEC report, wherein 3I Co. properly characterized this stock as "terminated stock rights." Therefore, for a mere payment of $150,000, 3I Co. set up an asset valued at $1,000,000 on its balance sheet.

Main Lafrentz aided and abetted defendants in its Report and (certificate) and its accompanying Notes by failing to disclose that there was no data bank license purchased "at cost" for $1,000,000 and by failing to disclose that 3I Co. balance sheet assets were more than doubled by the inclusion therein of this data bank license by the use of restricted, legended stock.

Concurrent with plaintiff's aforesaid affidavits, Main Lafrentz moved for a protective order to prevent plaintiff from deposing Main Lafrentz personell and partners who conducted the 3I Co. audit (277a-278a). It was patent that Main Lafrentz had moved for a protective order to require the court to decide the merits of the case on affidavits. Plaintiff did not oppose the Main Lafrentz maneuver, since plainitiff believed that the aforesaid affidavits showed the court genuine issues as to material facts and that Main Lafrentz

was not entitled to judgment as matter of law (375a-376a).

It was further obvious that the Main Lafrentz motion for a protective order was to preclude plaintiff from discovering Main Lafrentz worksheets bearing on the Von Eugen agreements in connection with 3I Co.'s understatement of current liabilities to Von Eugen in the amount of $150,000.

The worthlessness of the Excerpta Medica data bank license was shown both in the 3I Co. Consolidated Summary of Operations and Deficit for years ended June 30, 1968 to June 30, 1972 wherein 3I Co. wrote off the entire cost of data bank license as an extra-ordinary item (415a) and also in Note 5, 3I Co. Notes to 1972 Consolidated Financial Statements, wherein the write-off of the data bank was termed an extra-ordinary item as "this amount ($1,000,000) was deemed (by 3I Co.) not to be recoverable through future operations because of the losses sustained..." (275a). It is submitted as was already shown in the ICA write-off (supra), 3I Co's write-off of the data bank license as "an extra-ordinary loss" was merely 3I Co.'s mode of terming the data bank license as "worthless."

Plaintiffs' aforesaid affidavit verified November 8, 1973, was also directed to that portion of Main Lafrentz Note 1 which failed to disclose that 3I Co.'s subsidiary SLC had sustained a net earnings loss of fiscal year 1970, thus aiding and abetting

defendants 3I Co., Brodksy and Kessler in their false statement of SLC profitability (414a). In brief summary, plaintiff presented the Court below with the following:

> Under the terms of an agreement dated April 1, 1969, paragraph 15(b) (264a), Main Lafrentz was required to compute the pre-tax earnings for SLC to determine if there was at least $58,400 in net profit for fiscal 1970. Paragraph 15(b)(ii) provided that for the computation of pre-tax earnings:
>
> > (ii) "No allocation of general administrative cost and expenses of 3i shall be made to subsidiary, except such as shall be directly attributable to the operation of subsidiary's business as a wholly owned subsidiary of 3i" (emphasis added) (264a).
>
> On its summary judgment motion, Main Lafrentz submitted an affidavit from Frank Warburton, the partner in charge of 1970 3I Co. audit (256a-257a), together with a work sheet of 3I Co. consolidating profit and loss statement June 30, 1970 (258a).
>
> This work sheet showed a net loss for SLC of $1055. One of the items of expense shown was classified "Selling and administrative expenses $82,362", which did not meet the requirements of aforesaid paragraph 15(b)(ii).
>
> In an effort to convince the court that there actually was a net profit for SLC, Warburton in his affidavit obviously changed the expense classification from

> "Selling and administrative expenses" to "Indirect general and administrative expenses."
>
> It was obvious that Main Lafrentz moved swiftly for a protective order to preclude plaintiff from deposing Warburton and being clear as to the truth as to this obvious discrepancy between Warburton's affidavit and worksheet, wherein a loss was "changed" into a profit.

C. Wright and A. Miller, Federal Practice and Procedure §2727 at pages 526,527 stated:

> "Before summary judgment will be granted it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. Because the burden is on the movant, the evidence presented to the court always is construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences that can be drawn from it" (emphasis added).

With deference, appellants submit that the lower Court misconstrued Brodsky's aforesaid letter to Brownstein of June 23, 1971 (403a)* Furthermore, the

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*Brodsky's letter (quoted supra) informed Brownstein that his report contained "earnings projections and other reported financial information which is in error" (403a).

The Court erroneously summarized this paragraph as ". . .a letter addressed to him from Brodsky dated June 23, 1971, which letter stated that 3i Co. could not be responsible for the accuracy of future earnings projections" (560a).

court has misconstrued complaint paragraph No. 28f, subparagraphs 2,3 and 4* (497a-498a). These errors by the lower Court underline its misunderstanding of the vital issues of this litigation.

A further indication that Judge Bonsal misconstrued the complaint and plaintiffs' proof is to be seen in his statements on the oral argument of January 7, 1974, that "assuming the data bank was worthless," "I can see that would be a charge of wasting assets. . ." (543a). Nowhere in in the complaint herein was there a charge of wasting assets. Specifically, the complaint and plaintiffs' proof showed that these defendants created a snow ball effect by doubling the balance sheet assets of a small company at a minimal cost** and giving the investing public a false picture that major acquisitions were being made, when in fact,

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*Paragraph No. 28f subparagraphs 2,3 and 4 of the complaint allege that Brownstein in his Report and Bulletins (2) deceptively understated the 3I Co. loss of earnings for fiscal year 1970 (3) deceptively grossly over-estimated unfounded 3I Co. earnings for fiscal 1971 (4) deceptively grossly over-estimated unfounded 3I Co. earnings for fiscal year 1972 (497a-498a-emphasis added).

The Court erroneously summarized this paragraph as "that defendants, through the Reports and Bulletins of defendant Brownstein [a securities analyst employed by Marine Midland], understated earnings for fiscal year 1970, fiscal year 1971 and fisal year 1972" (560a-emphasis added).

**3I Co. paid Von Eugen $150,000 for his role as a business broker (supra).

Plaintiff presented proof of this massive stock distribution* to the Court below which showed that between December 1, 1969 and September 30, 1972 the number of 3I Co. stockholders had almost doubled (e.g. there were 1900 stockholders on September 30, 1972 as compared with only 1025 stockholders on December 1, 1969). Furthermore, between June 30, 1969 and June 30, 1972, 3I Co. had distributed more than 1,100,000 additional shares of stock (e.g. there were 2,460,916 shares Class A issued and outstanding on June 30, 1972 as compared with only 1,314,302 shares Class A issued and outstanding on June 30, 1969).

Plaintiffs further presented proof to the Court below that Gerald Brodsky, 3I Co.'s chief officer and major stockholder also profited in his conversion of 129,475 shares of 3I Co. Class B stock** into unrestricted Class A stock for sale on the open market to unsuspecting purchasers.

The unfairness of favoring form over substance is evident in Judge Bonsal's memorandum

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*3I Co. Form 10K for fiscal 1969, page 2 (416a).
Form 10K for fiscal 1972 (417a).
Form 8K for quarter September 30, 1972, page 16, (418a).

**Class B shares were only held by Brodsky and were restricted for sale.

opinion. Whereas on page 8 thereof (562a), the court states that:

> "the amended complaint does not set forth the dates on which either of the plaintiffs made purchases or sale of 3i Co. stock,"

on page 9 (563a) the court states that:

> "it appears from his (Felton's) testimony* and exhibits** at a deposition of plaintiff that he made five purchases of 3i Co. stock, all through the same broker (defendant Nissan, who is an employee of Walston) between July 9, 1970 and June 7, 1971."

In brief summary, plaintiff Felton's testimony presented to the court below, the following:

> Plaintiff's original purchase of 2000 shares of 3I Co. common stock on July 9, 1970 at a price of approximately $4.75 per share was in reliance on a statement of James Nissan that "he would recommend that you buy 3i Co. It is a very good price" (128a).
>
> By January, 1971, the 3I Co. market price increased to approx-

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*Relevant excerpts of plaintiff Felton's testimony relating to his transactions in 3I Co. stock were presented to the court by defendants and plaintiff (123a-159a). Plaintiff Egan's affidavit was also presented by plaintiffs (299a-300a).

**Exhibit detailing plaintiff Felton's transactions in 3I Co. stock, as aforesaid was presented to the Court below by defendants (367a).

imately $7. Plaintiff was apprehensive and wanted to sell, but he was dissuaded from selling by Nissan who said that he was "recommending it to somebody else at $7 and buying it for them" (130a-131a).

On January 13, 1971, Nissan induced plaintiff to buy 1000 additional shares at $7.75 per share by stating that "he expected the stock to go to $15" (133a).

By February 1, 1971, the price of the stock had doubled to $9.50 per share and the plaintiff was told by Nissan that the price "still was going up to $15." Plaintiff cautiously sold 1000 shares at $9.50 (134a).

On February 9, 1971, the price of the stock had almost tripled to $12.09 per share and despite Nissan's statement that "he would see $15," plaintiff cautiously sold the remaining 2000 shares at $12.50 (136a).

Parenthetically, at this point, it must be noted that plaintiff had made a substantial profit on his transactions. This was also noted by Judge Bonsal in his memorandum opinion (563a), but unfortunately Judge Bonsal misconstrued the full nature and effect of these defendants' fraudulent actions on 3I Co. market price and the ultimate losses sustained by plaintiff. In fairness to the truth, the entire course of plaintiff's transactions in 3I Co. stock must be

examined, not just the first three which gave plaintiff a "paper profit." In each instance, plaintiff cautiously sold stock at a higher price and realized a profit, but was continuously induced to repurchase the stock at higher prices.

> Nissan again stated on March 2, 1971 that "the stock would be $15" and that plaintiff was premature in selling at $12.50 in response to plaintiff's question, "Isn't it peculiar that I should be paying for stock what I sold it at. . .?" Plaintiff was induced to repurchase 3000 shares at $11.75 to $12 per share (138a).
>
> On March 16, 1971 plaintiff again cautiously sold 2000 shares at approximately $15 per share, but was induced to repurchase these 2000 shares on March 22, 1971 at approximately the same price in reliance on Nissan's stating that 3I Co. had purchased "a big European data bank (Excerpta Medica) and they (3I Co.) changed their whole capacities" because of this purchase. In this regard, Nissan advised plaintiff to read about the Excerpta Medica data bank in the 1970 Annual Report. Plaintiff also relied on Nissan's statement that he was in touch with 3I Co. management and 3I Co. "earnings are going to be pretty nice and in the black for '71" (141a-142a).
>
> Plaintiff also relied on Nissan's informing him that 3I Co. was working on a couple of big acquisitions. Nissan further identified these acquisitions as "a couple of multi-million dollar acquisitions" the (ICA)

acquisitions) and further stated to plaintiff "you know right now how important acquisitions are to a growing company" (146a), and "that should put them (3I Co.) in a much better position all a-round" (142a).

On April 13, 1971, once again plaintiff cautiously attempted to sell 3I Co. shares. Nissan told plaintiff that "the story was the same" as to the (ICA) acquisitions and 3I Co. earnings being in the black for 1971, and thus Nissan induced plaintiff not to sell 2000 shares (144a-145a).

Plaintiff read the 3I Co. 1970 Annual Report sent him by Nissan. Plaintiff "saw that they (3I Co.) had shown on their balance sheet over a million dollars worth for the data bank license purchase at cost" (145a).

On June 7, 1971, the 3I Co. price had risen to $20 and plaintiff called Nissan to sell his 2000 shares. However, Nissan induced plaintiff to retain these 2000 shares and furthermore, induced plaintiff to purchase an additional 1000 shares at $20 by reminding plaintiff of "the big (ICA) acquisition," by repeating "that Mr. (Gerald) Brodsky assures me (Nissan) that the earnings are going to be in the black for the year" by stating the "3I Co. was also talking about another acquisition, that may be a couple of months off," and by telling plaintiff that "the best news of all is the fact that a major bank is writing up a very favorable report on the company and as a matter of fact, it's buying up a lot of the stock and once the news gets out about that. . .the stock is really going to take off" (148a-149a).

> Thereafter, Martin Falk, plaintiff's friend, confirmed that Marine Midland was "buying a lot (of 3I Co. stock) for the bank" (150a-151a).
>
> On June 21, 1971, Nissan repeated the aforesaid statements made on June 7, 1971 to plaintiff and induced plaintiff not to sell 2700 shares (153a).
>
> In July, 1971, Martin Falk showed plaintiff a copy of the Brownstein (Marine Midland) Report (154a).
>
> Thereafter, on December 27, 1971, plaintiff sold 700 shares at a very considerable loss, approximately $7 per share.
>
> Plaintiff Felton at present owns 2000 shares, costing between $14.85 to $20 per share which is quoted at less than fifty $.50 cents per share.

In the summary of plaintiff's transactions, the fraudulent actions of these defendants, with their resultant market price impact gave plaintiff only illusory paper profits and continued to induce plaintiff's repurchases of the stock at higher prices equivalent to his previous sales. Plaintiff Felton's loss is in the amount of $14,448.

A free and open market should reflect an independent consensus between buyers and sellers in a course of trading. Defendants' common course of action in artificially and substantially inflating 3I Co.'s market price significantly interfered with that independent concensus.

As early as January 13, 1971, when 3I Co. stock was trading at $7.75 per share, Nissan "expected the stock to go to $15" (infra). This anticipation of a doubling in price could be put aside as "puffing", were it not for Nissan's insider relationship as a 3I Co. shareholder and warrant holder, a co-guarantor of 3I Co. bank loan (419a); a vice president of a large brokerage house which was a dealer and a market maker in 3I Co. stock; and Nissan's relationship with Brownstein. 3I Co. was known on Wall Street as Nissan's stock (151a).

The Court below also had before it a record of co-plaintiff Edward Egan's transactions in 3I Co. stock,* wherein Egan stated that he purchased 200 shares at a cost of $18.25 per share on May 28, 1971 in reliance on the statements of Garret Penhale, an assistant vice-president of a Marine Midland subsidiary, that "the bank thought highly of [3I Co.]. . .and that the bank was buying 3I Co. for some of its accounts," and in reliance on Brownstein's May 17, 1971 Report, a copy of which was delivered by Penhale to Egan's office. Egan further stated that he sold these shares at $7.25

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*Egan's affidavit verified November 7, 1973 was presented to the court by plaintiffs (299a-300a).

per share on October 19, 1971 at a substantial loss.

It is respectfully submitted that the aforesaid enumerated matters, inclusive of plaintiffs' affidavits, exhibits, defendants' admissions in prior pleadings and relevant portions of defendants' testimony presented to the Court below show that genuine issues of material fact exist and that this case must go to trial (Rule 56 FRCP). Therefore, the lower Court should have denied defendants' motions.

(b) Defendants did not raise the issue of Rule 9(b) in framing responsive Answers to plaintiff's prior complaint. Therefore, defendants waived Rule 9(b) as to this short and concise complaint served pursuant to the directive of Judge Bonsal.

Assuming arguendo, but without conceding that the lower Court did not commit reversible error discussed in Point I, nonetheless the defendants waived their right to challenge this short and concise complaint* because they had originally accepted and answered plaintiff's complaint filed August 14, 1973 (35a-71a). By

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*Defendant Marine Midland moved to dismiss the original complaint of May 17, 1973 or for a more definite statement under FRCP 12(b)6 and 12(e) by reason of plaintiff's failure to comply with FRCP 9(b) (26a-28a). No similar objection was made to the August 14, 1973 complaint filed in response thereto and Marine Midland never again raised this issue until after the "short and concise" complaint was filed pursuant to Court order (523a-524a).

answering, defendants agreed (1) that plaintiff's complaint had stated a claim with the particularity required by Rule 9(b); and (2) that the complaint alleged facts with sufficient particularity to permit defendants to frame responsive pleadings (85a-92a, 93a-98a, 103a-107a, 108a-112a, 160a-165a, 168a-171a).

Plaintiffs believe that nowhere in the court's directive of November 19th was there any order that plaintiff was "granted leave to serve and file a 'final' amended complaint" as the court's memorandum opinion states (558a). Specifically, the memo endorsed by Judge Bonsal on plaintiffs' complaint filed November 29th merely stated: "Leave to file an amended complaint is granted" (502a).

Conforming to the directive of the Court below, plaintiffs' complaint of November 29th was a short and concise version of the "lengthy" August 14th complaint, with the addition of facts discovered at Brownstein's deposition and including the claim of Edward J. Egan as outlined in Egan's aforesaid affidavit (299a-300a).

C. Wright and A. Miller, Federal Rules of Civil Procedure, Volume 5 (1969) §1300, pages 418, states:

> ". . .a party who fails to object to the manner in which fraud or mistake is pleaded waives the specificity requirement."

In agreement, J. Moore, Moore's Federal Practice, Volume 2A (1974) §9.03, page 1934, states:

> "A party who fails to raise the issue of failure to plead with particularity under Rule 9 (b) normally waives the requirement."

Defendants did not raise the issue of Rule 9(b) in their framing responsive Answers to plaintiff's prior complaint of August 14th. Therefore, defendants waived Rule 9(b) as to any further proceedings and, in particular, to this short and concise version of the prior complaint served pursuant to the aforesaid directive of Judge Bonsal.

(c) Plaintiffs' complaint filed on November 29, 1973 by directive of Judge Bonsal is a short and concise statement pursuant to Rule 8, FRCP, with the particularity required by Rule 9(b), FRCP.

Assuming arguendo, but without conceding that the Court below did not commit the error complained of in Point I, the dismissal of the plaintiffs' complaint of November 29th was still error because it is a short and concise statement, in compliance with Rule 8 FRCP, with the particularity required by Rule 9(b), and thus gives these defendants fair notice of plaintiffs' claims and the grounds upon which plaintiffs' claims rest.

> "The requirement of particularity does not abrogate Rule 8, and should be harmonized with the general directives in subdivisions (a) and (e) of Rules 8 that the pleading should contain 'a short and plain statement of the claim or defense' and that each averment should be simple, concise and direct." (J.Moore, Moore's Federal Practice, Volume 2a(1974) §9.03 page 1930.)

The court in Shemtob v. Shearson, Hammill & Co., 448 F.2d 442,444 (2d.Cir.1971) similarly stated their definition of particularity:

> ". . .we are not unmindful that the Federal Rules of Civil Procedure do not require a claimant to set out in detail facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the claim is and the grounds upon which it rests" (Conley v. Gibson, 355 U.S. 41,47,78 S.Ct.99).

In accord with Shemtob, the court in Collins v. Rukin, 342 F.Supp. 1282, 1292(D.C.Mass.1972) summarized the determination of particularity of complaints as follows:

> "In determining whether the complaint should be dismissed for failure to state with sufficient particularity the circumstances constituting fraud, as required by Fed.R.Civ.P.9(b), the Court is rightfully mindful of the mandate of Fed.R.Civ.P.8,viz., that a pleading set forth in its claim for

> relief in a "short and plain statement," that averments be "simple, concise and direct," and that "no technical forms of pleading are required." That Rules 8 and 9(b) should be read in conjunction is well established. See 5 Wright & Miller, Federal Practice and Procedure: Civil §1298 and cases cited. The Federal Rules of Civil Procedure do not require that a claimant set out in detail the facts upon which he bases his claim. Garcia v. Bernabe, 289 F. 2d 690 (1 Cir.1961). Furthermore, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" (Conley v. Gibson, 355 U.S.41,45-46, 78 S.Ct. 99,102,2 L.Ed.2d 80(1957)."

The complaint herein is both a short and concise statement of plaintiffs' claim and a short and concise version of plaintiff's prior complaint filed August 14, 1973. C. Wright and A. Miller, Federal Practice and Procedure, §1298, page 415 stated the test of the sufficiency of a pleading under Rule 9(b) as:

> "Perhaps the most basic consideration in making a judgment as to the sufficiency of a complaint is the determination of how much detail is necessary to give adequate notice to an adverse party and enable him to prepare a responsive pleading" (emphasis added).

Defendants have already admitted the sufficiency of plaintiff's August 14, 1973 complaint by

serving their Answers responding thereto. Defendants have enjoyed the advantage of a total picture in both the August 14th lengthy complaint as well as the November 29th short and concise version thereof. Defendants therefore may not question sufficiency of the November 29th complaint.

The Court below in its memorandum opinion pointed out that the amended complaint's allegations were made on information and belief.* However, this court had before it the Main Lafrentz motion for a protective order to preclude plaintiff from deposing Main Lafrentz auditors involved in the 3I Co. audit, in particular, Frank Warburton. Furthermore, to date, only two defendants (Nissan and Brownstein) have been deposed by plaintiffs; ten (10) individual defendants, including Brodsky, are yet to be deposed. Requests for certain documents to be produced for plaintiffs' inspection have not been complied with by 3I Co., Walston and Marine Midland. It is submitted that with so many facts and proof as yet peculiarly within the adverse parties' knowledge, plaintiffs properly alleged fraud on information and belief accompanied by a statement of the facts, constituting the fraud of defendants

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*562a.

herein,* in conformity with the exception to the so-called general rule as stated in Segal v. Gordon, 467 F.2d 602,608 (2d Cir.1972):

> "While the rule [i.e. against pleadings on information and belief] is relaxed as to matters peculiarly within the adverse parties knowledge, the allegations must then be accompanied by a statement of facts upon which the belief is founded."

Considering that defendants had already compiled a complete record of plaintiffs' transactions in 3I Co. stock and accordingly never raised the issue of pleading individual dates of purchase, it was a complete surprise and most unfair that the Court below should raise the issue in its memorandum opinion.

In its decision, the lower Court stated that the complaint was deficient because it did not "state whether the plaintiffs relied on the statements and declarations alleged to have been false and misleading" (562a). Paragraph No. 30 of the complaint, however, specifically pleaded the circumstances under which plaintiffs and others similarly situated were induced to purchase 3I Co. stock:

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*During the argument on this complaint (January 7,1974, 532a-554a) the lower Court expressly stated that it was "not worried about the fact that the complaint was pleaded on information and belief" (547a).

> "30. As the result of the aforesaid common scheme and common course of fraudulent action of these defendants, which initially reached the investing public with the filing of defendant 3I Co. 1970 Annual Report on December 10, 1970, the market price of the otherwise worthless 3I Co. common stock was caused to have a substantial artificial price increase, and plaintiffs and the Class were induced to purchase this stock without the knowledge of these defendants' fraudulent actions" (emphasis added)(499a).

Professor Bromberg in Securities Law Fraud, SEC Rule 10b5 §8.6(2), page 212, discusses "reliance" in open market trades:

> "If the misstatement does not come to plaintiff's attention, as can easily happen in open market trades, it would be meaningless to demand reliance. It would also be unfair, since an investor who trades with reference to market price and conditions may be affected by the misstatement although he never hears it. This difficulty might be overcome by saying that he has relied indirectly. (Painter, op.cit.supra n.43 at 1370.Comment, 74 Yale L.J. 658,672(1965), advocates dispensing with reliance in situations like this, if the misconduct is intentional, and accepting causation and forseeability. Causation would occur if plaintiff's investment decision was caused by the market change initiated by defendant's misconduct, even though he was unaware of the misconduct itself."

The lower court in its memorandum opinion has referred to the "in connection" requirement, SEC Rule 10b-5 in stating that the complaint did not identify "to whom [defendants' statements] were addressed or whether they affected or related to transactions in 3i Co. stock" (562a).

The "in connection with" requirement of SEC Rule 10b-5 has been construed broadly by this Circuit in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2nd Cir.1968) wherein the court stated:

> ". . .we hold that Rule 10b-5 is violated whenever assertions are made, as here, in a manner calculated to influence the investing public, e.g., by means of the financial media. . ."

In Heit v. Weitzen, 402 F.2d 909,913 (2nd Cir. 1968) this Circuit further stated:

> "[Texas Gulf Sulphur] construed the 'in connection with' requirement broadly and held that the clause was satisfied whenever a device was employed 'of a sort that would cause reasonable investors to rely thereon, and in connection therewith, so relying, cause them to purchase or sell a corporation's securities. . .'" (emphasis added.)

It is respectfully submitted that this complaint has pleaded "in connection" in alleging that defendants' statements were contained in 3I Co.'s

Annual 1970 Report and in Brownstein's Report and Bulletins* and were addressed to plaintiffs and other open market purchasers (493a,495a-501a).

In its decision, the lower Court stated that the complaint was deficient in not "alleg[ing] in what respect the declarations and statements were false, misleading or deceptive except to make conclusory allegations, such as for example, that the data bank license purchased by 3I Co. was 'worthless'. . ." (562a). It is submitted that the Excerpta Medica data bank license was worthless. This was well-pleaded and considered allegation. 3I Co. also termed this license worthless in writing off its entire valuation "as not to be recoverable through future operations because of the losses sustained" (275a-supra). It is further submitted that the 14 page moving affidavit of the Main Lafrentz summary judgment motion,** in its line by line attempted refutation, underscores that the complaint herein pleaded with particularity (505a-519a).

The actions of these defendants were not the garden type of variety of fraud as evidenced by 3I Co.'s

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*3I Co. news releases were included in some of Brownstein's Bulletins.

**Main Lafrentz moved to dismiss and in the alternative renewed its Rule 56 motion for summary judgment (503a-505a).

distribution of over 1,100,000 additional shares of stock and Gerald Brodsky's conversion of 129,475 shares of restricted stock for sale to the unsuspecting public. The full extent of insiders' profits awaits further discovery and inspection.

As Judge Kaufman stated in A.T. Brod and Co. v. Perlow, 375 F.2d 393,397 (1967) in reversing Judge Bonsal's dismissal of the complaint therein:

> "Nor do we think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities.' We believe that §10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type of variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the laws."

The lower Court was in error dismissing the complaint herein, a short and concise version of a prior complaint which defendants deemed sufficiently detailed to answer. The complaint herein has stated the facts upon which the action is founded consistent with Rule 8 FRCP with the particularity required by Rule 9(b) FRCP.

POINT III

IF THERE BE ANY TECHNICAL DEFECTS OF PLEADING, LEAVE TO CURE THEM BY AMENDMENT SHOULD BE GRANTED.

This proposition does not require elaboration. Downey v. Palmer, 114 F.2d 116,117 (2nd.Cir.1940); Nagler v. Admiral Corp., 248 F.2d 319,322 (2nd. Cir.1957): Klebanow v. New York Produce Exchange, 344 F.2d 294,299-300 (2nd.Cir.1965).

POINT IV

JUDGE BONSAL HAS FAILED TO EXERCISE INFORMED DISCRETION IN HIS DETERMINATION OF PLAINTIFFS' MOTION FOR CLASS ACTION UNDER RULE 23.

It is plaintiffs' contention that the lower Court, although applying the correct criteria of Rule 23, did not canvass all the factual aspects of this litigation before determining plaintiffs' class action motion.

Plaintiffs understand that the Supreme Court in Eisen v. Carlisle and Jacquelin, 94 S.Ct. 2140 (1974) in rejecting a preliminary inquiry into the merits of a proposed class action stated that a preliminary evidentiary hearing "may result in prejudice to a

defendant since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials" (emphasis added).

On the other hand, however, it is contended that a trial Judge may not close his eyes to the facts of proof presented to him by plaintiff to the substantial prejudice of the plaintiff.

Rule 23(b)3 FRCP requires findings of fact to be made by the trial Judge before a class action motion may be determined. Federal Local Court Rules, Southern District 11A(c) requires prompt findings of facts in that plaintiff "shall move for a determination" within sixty (60) days after the filing of a pleading.

Defendants herein also understood that Judge Bonsal required facts to reach his Rule 23 determination and to that end defendants requested an adjournment of plaintiffs' Rule 23 motion until November 12, 1973 (172a-173a).

This Circuit in City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295 (2nd Cir. 1969) has stated that the judgment of the trial judge in a Rule 23 motion should be given the greatest respect and the broadest discretion:

(City of New York page 295)

> "particularly where he has canvassed the factual aspects of the litigation."

On page 298 of that decision, the appellate court noted that the trial judge (Judge Ryan) had decreed, "upon the facts presented."

So, too, in Gold Strike Stamp Company v. Christensen, 436 F.2d 791,793 (10th Cir.1970) the appellate court stated:

> "From the findings of fact made by Judge Christensen in his order of July 21, 1970, it is apparent that he did apply the correct criteria and his finding that the class action should proceed did not constitue an abuse of discretion (with footnote listing the pertinent findings of fact)."(emphasis added.)

With deference, it must be said that there were no "findings of fact" made by the lower Court in determining the issues of whether or not there were questions of law and fact common to the class and if there were such common questions, if they would predominate over individual facts. It must be further said that the lower Court determined these Rule 23 criteria in the same manner as it erroneously determined defendants' motions to dismiss, i.e. in vacuo, by merely reading the complaint. Facts were presented by plaintiffs to the lower Court and it is obvious that these facts were never read or considered by the lower Court. Accordingly its

opinion reads:

> "Moreover, since the amended complaint names a large group of defendants connected only by a conclusory allegation of conspiracy, the Court is not persuaded that the questions of law and fact sought to be raised therein are common to the alleged 8,000 or more members of the class; nor is it apparent that if there are such common questions, they would predominate over individual questions" (563a).

It is further obvious that this lower Court would arbitrarily deny class action status to any complaint charging defendants with conspiracy, without considering the facts of proof presented by the plaintiffs.

Contrary to the decision of the lower Court, Chief Judge Lord in Penn Central Securities Litigation, CCH Securities Reporter, §93,610 at p.92,808 (Eastern District of Pennsylvania, 1972) stated:

> "we find that although the complaints allege that numerous misleading statements and reports were issued during the period of question, the complaints allege that defendants engaged in a common course of fraudulent conduct which was directed against all investors and that the financial statements issued were interrelated and cumulative, thus raising substantial questions which are common to all investors. See Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (C.A.9, 1964)."

(Penn Central Securities Litigation, page 92,808)

> "***To be sure, we're not dealing here with a single alleged fraudulent misrepresentation or the issuance of a single document containing several alleged misrepresentations. Like standing dominoes, however, one misrepresentation in a financial statement can cause subsequent statements to fall into inaccuracy and distortion when considered by themselves or compared with previous statements. Such a possible close causal relationship between the various alleged misrepresentations in the Yale financail statements leads to the conclusion that members of the class are interested in 'common questions of law and fact' Fischer v. Kletz, 41 F.R.D. 377,381 (S.D.N.Y.1966)."

The lower Court found plaintiff Felton, pro se, a member of the Federal bar since 1955, "experience[d] and skill[ed] in negligence litigation," "rather than in securities litigation." It is contended that it was error for the lower Court to nebulously lump the civil torts of these defendants into "securities litigation." The complaint herein has charged these defendants with the civil tort of common law fraud and the statutory tort with implied liability of Section 10(b) of the Exchange Act and Rule 10(b)5* promulgated

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*The Courts have found implied liability under the statutory tort of the violation of Section 10(b) of the Exchange Act and Rule 10(b)5 promulgated thereunder. Moscarelli v. Stamm, 288 F.Supp.453,457 (E.D.N.Y. 1968) explains that "since one of the purposes of the Act is the protection of the individual investor as well as the public at large, a civil tort has been implied from a violation of the standard of conduct set forth in the Act upon the principles enunciated in Restatement (Second), Torts, §286 (1965)."

thereunder.

Furthermore, it is obvious that the lower Court has not read or considered Felton's testimony relating to his preparation for the prosecution of this case. A brief summary of his testimony* shows Felton's resolve:

> "In an effort to become proficient for the prosecution of this case, Felton, after reading A.Bromberg, Securities Law Fraud, SEC Rule 10b-5, purchased the two volume set. Felton spend most of three (3) months preparing himself for this action, spending hundreds of hours reading and referring to securities law treatises, i.e. Professor Bromberg treatise (supra), Professor Loss treatise and Exchange Act of 1934, and in studying the Restatement of Torts (123a-125a).

Had the lower Court read or considered the testimony of plaintiff Felton and the proof of the fraud of these defendants already developed and presented by Felton, it would have seen Felton's resolve to vigorously prosecute this action so that the rights of others similarly situated were certain to be protected. Furthermore, had the lower Court as "the finder of facts" considered plaintiff's testimony in the light of its prior determination of Felton's experience and skills

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*Excerpted from his deposition (123a-159a).

in the litigation of the tort of negligence, it would have found him equally well suited to the prosecution of this action for the civil tort of common law fraud and statutory tort with implied liability charged to these defendants.

Judge Bonsal in his memorandum opinion stated that of plaintiff Felton's five purchases, "on all but the last two purchases the stock was later sold at a substantial profit." With deference, had Judge Bonsal as "the finder of facts" read or considered plaintiffs' affidavits and proof, he would have seen that the common course of fraudulent action of these defendants did not permit Felton to enjoy anthing more illusory than a "paper profit" in his transactions in 3I Co. stock.

As was shown to the court and obviously not read or considered, there was no profit to be made by plaintiffs and others similarly situated. The profit was reserved for the insiders in their massive distribution of 3I Co. stock to the unsuspecting public. Each sale by Felton at a higher price than his purchase, his paper profit so to speak, was promptly nullified and sucked back into his repurchase at a higher price.

Felton's paper profits were a mirage as

defendants' actions like the "Song of die Lorelei" continued to induce him to reinvest. One day, after their "Song" was sung,* the 3I Co. market price fell 50% (155a) and then just kept falling. Plaintiff Felton, as all others similarly situated sustained a subtantial loss.

Not "finding" these facts concerning Felton's loss, the lower Court in its opinion did not consider Felton's substantial loss of $14,448 as a crucial factor. Plaintiffs understand that this Circuit in Eisen v. Carlisle and Jacquelin, 391 F.2d 555,556 (2d.Cir.1968) (Eisen II) on remand 52 F.R.D. 253 (S.D.N.Y.1971) rev'd 479 F.2d 1005 (2d.Cir.1973),(Eisen III), vacated and remanded, 94 S.Ct 2140(1974), concluded that the size of the representative's personal claim should not be dispositive of the question whether the class is adequately represented. However, C. Wright and A. Miller in their Federal Practice and Procedure (1972) volume 7, §1767, pages 637-638 stated:

> "In keeping with this (Eisen's) philosophy, courts generally have held that the extent of the representatives' interest is not determinative for purposes of satisfying Rule 23(a)(4). But the size of their claims is not totally irrelevant

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*In October, 1971, 3I Co. announced its loss of earnings for fiscal year 1971 and the market price plummeted (407a).

> Thus, several courts quite properly have noted that a large interest in the subject matter of the dispute may encourage the representative to prosecute or defend the action vigorously. This is not contrary to the approach taken in Eisen. The major emphasis in that case was on the point that the absence of a substantial personal interest does not necessarily mean that the representation is inadequate. In short, the personal or financial involvement to the representatives continues to be a factor that should be considered under Rule 23(a)(4)."

It must be noted that the lower Court in quoting plaintiff Felton's testimony out of context (rather than quoting the entire colloquy involved) has obviously referred to Sullivan and Cromwell's memorandum in opposition to plaintiffs' Rule 23 motion which also quoted Felton's testimony out of context.* With deference, it must be said that the Court below as "the finder of facts" had not read or considered Felton's entire testimony in its quotation out of context. To correct the record, this is exactly the testimony of Felton:

> "Q. Do you intend to apply for a fee to come out of any settlement or any judgment which might be awarded if this case

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*The Court's quotation in its memorandum opinion (563a) is an exact copy of the Sullivan and Cromwell memorandum page 16.

is considered a class action?

A. I am keeping a record of my disbursements, my expenses, and I am keeping a record of my time, sir.

Q. Do you intend to apply for an attorney's fee?

A. Yes.

Q. If this case if determined to be a class action?

A. Yes. I am represented here as plaintiff and plaintiff pro se.

Q. What percentage of adequate recovery, if any, do you intend to apply for as a fee?

A. It depends on a number of factors. As Mr. Willis suggested yesterday, this trial may take years. There are a number of factors, as far as the relative success, if, hopefully, as I anticipate, the settlement will be in the nature of what I believe it to be, there are a lot of variables here.

I know this, that part of the application of the fee, for the fee, is the amount of hours, days spent. But there are other things.

For example, I read the recent determination of fees by Judge Bonsal in the Texas Gulf Sulphur cases where he talks of the expertise of the attorneys.

These are the things that are subject of an application. It would be impossible and unfair of me to say at this time what I would request.

All I say is this, that I feel that a wrong has been done by a number of these defendants on this class, and I feel that I have the burden of righting this wrong. So I am looking for money damages to this.

Q. You are also looking for a fee for yourself, aren't you?

A. I certainly am.

Q. That was part of the motivation for you making this suit a purported class action, was it not?

A. May I say this in answer to you. I could not afford the time it would take on this particular case if I didn't have this in mind. That is one of the main purposes of Rule 23, which I said before to you when I said that small stockholders will have adequate representation for their rights. That is the purpose, one of the mainstays, in my opinion, of Rule 23.

I am here today, the second day on this deposition, and I hope to finish this as quickly as possible, but I am at your disposal, and this is what I meant.

Q. You agree if this case were permitted to proceed as a class action and notice went out to the class that this notice would tell the class action that you intended to apply for a fee out any recovery that was obtained?

A. Yes. And if any of the class members wanted to join, they certainly would be welcome" (Felton Tr. 313,314,315).

The lower Court has also not read or considered Felton's statement in his reply memorandum to defendants' opposition to Rule 23 motion, page 63:

> "So far to date I [Felton] have incurred over $2,000 in expenses, e.g. depositions of Nissan and Brownstein, copy of my deposition, trips to S.E.C. in Washington, D.C. I understand my duties and accept my responsibilities. I have stated to my adversary and I wish to repeat that I will pay the costs of Notice to the class and to this end I agree to post a bond."

Justice Douglas, in his dissent in part, with Justice Brennan and Marshall concurring in Eisen v. Carlisle and Jacquelin, 94 S.Ct 2140,2156, added his thoughts concerning the role of class actions:

> "I agree. . .that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration. I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due protection be protected."

> "The class action is one of the few legal remedies the small claimant has against those who command the status quo."

The plight of 3I Co. investors who were bilked by defendants' actions is no more evident than in the plaintive letter from one Jack Dalziel to Brownstein (411a):

> "Dear Mr. Brownstein:
>
> Your report of May 17, 1971 suggested a profit potential for the company [3I Co.] in 1971.
>
> The recent drop in the price of the stock suggests perhaps that continued losses are expected.
>
> Have you issued any follow-up to your May 17 report? If so, would you be kind enough to send me a copy?

With deference, it is obvious that the lower Court had not read or considered Jack Dalziel's letter in the light of Brownstein's "last word" about 3I Co. in his October 20, 1971 Bulletin, when after announcing the resignation of Gerald Brodsky as 3I Co.'s chief officer, Brownstein enigmatically stated:

> ". . .we no further comment at this time."

Needless to say, among the records produced by Browstein for discovery and inspection, nowhere was there to be found a letter from Brownstein to Jack Dalziel stating that "I am sorry."

It is submitted that Judge Bonsal, in failing to canvass all the factual aspects of this litigation, as the finder of the facts, has failed to exercise informed discretion in his determination of plaintiffs' motion under Rule 23, FRCP. Had he considered all the facts presented, he would have granted plaintiffs' motion. Therefore, his decision denying plaintiffs' motion for class action determination must be reversed.

CONCLUSION

It is submitted that the decisions below should be reversed, and the cause should be remanded for further proceedings.

Dated: Mineola, New York
July 26, 1974

Respectfully submitted,

ROBERT R. FELTON
Attorney for Plaintiffs and
Plaintiff pro se.

TEXT OF STATUTES AND REGULATIONS

Securities Exchange Act of 1934

§10(b), 15 USC §78j(b):

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-

***

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors

§20(a), 15 USC §78t(a):

(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the

acts or acts constituting the violation or cause of action.

Rule 10b-5 of the Securities and Exchange Commission, 17 CFR §*240.10b-5*

Reg. §240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

In connection with the purchase or sale of any security.

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

FELTON, Appellant,

against

WALSTON Co, et al, Defs.-Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Laurel N. Huggins, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1050 Carroll Place, Bronx, New York

That upon the 29th day of July 1974, deponent served the annexed Appellant's Brief upon * attorney(s) for * in this action, at * the address designated by said attorney(s) for that purpose by depositing 2 true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 29th day of July 19 74

Laurel N. Huggins

Print name beneath signature

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

LAUREL N. HUGGINS

*** Breed, Abbott & Morgan-Attorneys for Defs.-Appellees Walston & Co. and Nissan-1 Chase Manhattan Plaza, New York 10005.**

Sullivan & Cromwell-Attorneys for Defs.-Appellees Marine Midland and Brownstein-~~[illegible]~~ 48 Wall Street, New York 10005.

Leon, Weill & Mahoney-Attorneys for Def.-Appellee 31 Co./Information Interscience-261 Madison Avenue, New York 10016.

Anderson, Russell & Kill-Attorneys for Defs.-Appellees Elias, Riesenbach & Sher-600 5th Avenue, New York 10020.

Shea Gould Climenko & Kramer-Attorneys for Defs.-Appellees Stichting, Medica, Infonet and Eltrac-330 Madison Avenue, New York 10017.

Kaye, Scholar, Fierman, Hays & Handler-Attorneys for Def-Appellee Main Lafrentz & Co.-425 Park Avenue, New York 10022.